

Convicted of three counts of attempted murder, John Sutton is serving concurrent twenty-year sentences at the Robinson Correctional Center. His conviction was affirmed by the Illinois Appellate Court on September 27, 1996, no petition to the Illinois Supreme Court was filed. Post-conviction petitions in state court were denied as untimely and Sutton now proceeds in federal court seeking a writ of habeas corpus. 28 U.S.C. § 2254. The AEDPA applies. Since the post-conviction petitions were deemed untimely, they did not toll the one-year statute of limitations.

Sutton previously filed a habeas petition on June 23, 1999, but I dismissed that petition for failure to exhaust administrative remedies (Sutton was then appealing the denial of his second post-conviction petition). The pending petition was filed on January 23, 2001. Petitioner concedes his petition is beyond the one-year limitations period and respondent moves to dismiss.

Sutton makes three arguments for allowing him to proceed. First, he says the state waived its dismissal argument by failing to raise it in response to his first federal petition. Second, the delay in filing was caused by an unconstitutional impediment by the state; lockdowns and the loss of his legal papers prevented Sutton from researching and preparing his claims. 28 U.S.C. § 2244(d)(1)(B). Third, related to the second, the limitations period should be equitably tolled because of the lockdowns.

I will assume, without deciding, that the one-year statute of limitations is procedural, not jurisdictional; therefore doctrines such as waiver and equitable tolling could apply. See *Owens v. Boyd*, 235 F.3d 356, 360 (7th Cir. 2001); *United States v. Griffin*, 58 F. Supp.2d 863, 868 (N.D. Ill. 1999).

The state did not waive any arguments when it moved to dismiss the first petition (without prejudice) on grounds of failure to exhaust administrative remedies. The state explicitly reserved the right to raise any other argument in the event I did not dismiss the petition. Respondent's Motion to Dismiss ¶ 13, No. 99 C 4222, Docket # 16.

Petitioner has made no showing that lockdowns or delays caused by the state were unconstitutional impediments such that § 2244(d)(1)(B) would apply. He simply says that he was on lockdown, but does not say for how long or how the lockdown was unconstitutional.

Finally, I am not persuaded that equitable tolling should be applied in this case. Equitable tolling should be granted only in extraordinary circumstances, and as the state court noted in both of Sutton's post-conviction petitions, there was nothing exceptional to justify his late filings. There is no explanation for a three-year delay in pursuing his claims.

I also find that Sutton has not made a substantial showing of a denial of a constitutional right with respect to his ineffective assistance of counsel, failure to disprove self-defense beyond a reasonable doubt, and right to remain silent claims. The Illinois Appellate Court analyzed these issues, applied the appropriate legal authority and reached a reasoned result. Therefore, I decline to issue a certificate of appealability.

The motion to dismiss is granted [8-1], terminating the case. A certificate of appealability shall not issue.